FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FCP/158891

PRELIMINARY RECITALS

Pursuant to a petition filed July 09, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milw Cty Dept Family Care - MCO in regard to Medical Assistance, a hearing was held on August 27, 2014, at Milwaukee, Wisconsin. Post-hearing, the record was held open to allow the Petitioner to submit additional evidence. Additional evidence was submitted on September 9, 2014 and the record was closed.

The issue for determination is whether the agency properly determined the Petitioner is at a non-nursing home level of care.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Lillian Alford
Milw Cty Dept Family Care - MCO
901 N 9th St
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:
Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Milwaukee County.

2. Petitioner is 66 years old. Her diagnoses include: spinal stenosis, erythromelalgia, degenerative disc disease, degenerative joint disease, chronic pain, personality disorder, bipolar/manic depressive disorder, depression, visual impairment, and sleep apnea.

3. A Long Term Care Functional Screen (LTCFS) was completed in December, 2013. It concluded that the Petitioner was independent with all activities of daily living (ADLs) and that the Petitioner required assistance with four instrumental activities of daily living (IADLs): meal preparation, medication assistance/management, laundry/chores and transportation. It further noted that the Petitioner has cognitive disabilities due to being unable to make routine decisions in new situations. It also noted Petitioner has memory loss and that there is a need for mental health services.

4. A LTCFS was completed as part of the Petitioner's six month review on June 4, 2014 and a rescreen was conducted in July, 2014. The assessment at that time concluded that the Petitioner is independent with all ADLs and needs assistance with three IADLs: meal preparation, laundry/chores and transportation. It reported that the Petitioner does not always take her medications but that she is aware of the medications she is supposed to take and is aware of when and how she is to take them. The screener noted no cognitive problems and reported that she is able to make decisions with everyday concerns though she has a difficult time with making major life decisions. The screener noted issues with memory loss and a need for mental health services.

5. On June 25, 2014, the agency issued a notice to the Petitioner informing her that her level of care would change from nursing home to non-nursing home.

6. On July 9, 2014, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized in the Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10.

Wis. Admin. Code, §DHS 10.33(2) provides that an FCP applicant must have a functional capacity level of comprehensive or intermediate; I note here that Wis. Stat., §46.286, uses the terms "nursing home" and "non-nursing home" levels. If the person meets the comprehensive (nursing home) level, she is eligible for full services through a CMO, including Medical Assistance (MA). Wis. Admin. Code, §DHS 10.36(1)(a). If the person meets the intermediate (non-nursing home) level, she is eligible for full services only if she is in need of adult protective services, she is financially eligible for MA, or she is grandfathered as described in §DHS 10.33(3). Wis. Admin. Code, §DHS 10.36(1)(b). A person eligible under the non-nursing home level is eligible for less FCP services.

Wis. Admin. Code, §DHS 10.33(2)(c) describes comprehensive (nursing home) functional capacity:

> (c) Comprehensive functional capacity level. A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:
>
> 1. The person cannot safely or appropriately perform 3 or more activities of daily living.
> 2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
> 3. The person cannot safely or appropriately perform 5 or more IADLs.

4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:

a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self neglect or resistance to needed care.

Wis. Admin. Code, §DHS 10.33(2)(d) describes intermediate functional capacity:

d) Intermediate functional capacity level. A person is functionally eligible at the intermediate level if the person is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others, as is evidenced by a finding from application of the functional screening that the person needs assistance to safely or appropriately perform either of the following:

1. One or more ADL.
2. One or more of the following critical IADLs:
    a. Management of medications and treatments.
    b. Meal preparation and nutrition.
    c. Money management.

ADLs include bathing, dressing, eating, mobility, and transferring. Wis. Admin. Code, §DHS 10.13(1m). IADLs include meal preparation, medication management, money management, laundry and chores, telephone, and transportation.

The Department has developed a computerized functional assessment screening system. The system relies upon a face-to-face interview with a quality assurance screener who has at least a bachelor of science degree in a health or human services related field, with at least one year of experience working with the target populations (or, if not, an individual otherwise specifically approved by the Department based upon like combination of education and experience). The screener asks the applicant, or a recipient at a periodic review, questions about his or her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits the Functional Screen Report for the person to the Department's Division of Disability and Elder Services. The Department enters the Long Term Functional Screen data into a computer program to see if the person meets any of the required levels of care.

If the assessor enters information into the functional screen correctly, then it is assumed that the computer will accurately determine the level of care. However, in the past it has been evident that the screen might miss the intermediate functional level for FCP cases because the specifics of the code definition do not

necessary fit into the general definition of institutional care. Thus for FCP cases it is possible that a person could meet the code definition even if the person fails the functional screen.

The agency made two changes in the assessment of the Petitioner's needs from the December, 2013 LTCFS and the June/July, 2014 screening that impacted the results of the screen. – cognition and medication administration/management.

A. Cognition

The agency found in 2013 that the Petitioner had a cognitive impairment, that she could make safe, familiar/routine decisions but could not do so in new situations. In 2014, the agency did not find a cognitive impairment. In June, 2014, the assessor noted that the Petitioner has a difficult time with major life decisions and gets overwhelmed and anxious when making difficult decisions. In July, 2014, the assessor concluded the Petitioner's cognition should be changed to independent because the Petitioner can problem solve everyday issues.

The LTCFS instructions contain the following regarding Cognition:

> This section is meant to capture the person's ability to make daily decisions beyond those that involve managing their medications and finances.
>
> Routine daily decisions include time to get up or go to bed, what to do with free time, whether to visit friends, attend activities, shop, using scheduling cues such as clocks, calendars or reminder notes. The inability to make routine daily decision may indicate a cognitive deficit.

LTCFS Instructions Module 7, § 7.4. These instructions can be found online at http://www.dhs.wisconsin.gov/LTCare/FunctionalScreen/instructions.htm.

According to the instructions, a person is considered not to have a cognitive impairment if she can make independent decisions consistent with her own lifestyle, values and goals. Examples include: she can safely get through a day without needing a cue or reminder; she only needs assistance making non-routine decisions; she understands when and how to call for help if a problem or emergency arises; she can be left alone for short or long periods of time.

The instructions further states that a person who can make safe, familiar/routine decisions but cannot do so in new situations needs assistance at a Level 1. Examples include: she can safely get through a day without needing a cue or reminder but is unable to problem solve a new event or situation that is typically a routine daily decision for others; she is unable to respond appropriately to unexpected events, emergencies or problems typically a routine daily decision for others; she is able to be left alone for up to an hour but not longer; she does not have the capacity to know when or who to call for help.

Additionally, the instructions also state that a person who needs help with reminding, planning or adjusting routines, even with familiar routines, needs assistance at a Level 2. Examples include: she cannot safely get through a day without needing a cue, reminders or guidance to initiate, plan or complete routine everyday activities but can be left alone for up to an hour; she needs cues or reminders to eat, bathe, dress or brush her teeth but can be alone for up to an hour.

The agency's notes and testimony are conclusory in nature. There was no explanation provided in the LTCFS or at the hearing to support the conclusion that the Petitioner had a cognitive impairment in December, 2013 but does not have a cognitive impairment in June, 2014. The evidence submitted by the Petitioner and the testimony at the hearing demonstrate that the Petitioner is not independent in routine

decision-making. Her mental health conditions make it difficult for her to make routine decisions regarding activities of daily living without cueing or reminders. Therefore, I conclude that cognition should be at a level 2.

B. Medication Administration/Management

In 2013, the agency concluded the Petitioner needed assistance with medication administration/management. The screener noted that the Petitioner admits to forgetting to take her medications at time or does not want to take them. It noted that she is capable of filling her own medication box. She refuses medication management services. In 2014, the agency concluded she no longer needs this assistance. The assessor noted again that the Petitioner admits that she does not always take her medications because she states she does not want to become addicted. At the hearing, the agency testified that the Petitioner was able to tell the assessor all of her medications and when they should be taken.

The LTCFS Instructions define "medication management" as: "[a] person's need for assistance from another person to set-up or monitor their prescribed and regularly taken medications." LTCFS Instructions Module 4, § 4.14.

According to the instructions, a person is independent with medication administration/management if she has the cognitive ability to take the medications as prescribed and to understand or report any problems that might arise from the medications.

The Petitioner's need for assistance with this task appears not to have changed based on the notes from the screeners in 2013 and 2014. At both screenings, she was noted to sometimes refuse to take her medications but was able to tell the assessors what medications she was taking and when they should be taken. The reason for the agency change in the level of assistance needed is not evident in the LTCFS notes or the testimony at hearing.

The evidence from the Petitioner demonstrates that she does not have the cognitive ability to appropriately manage or administer her own medications. She fears addiction to the medications and therefore sometimes refuses to take them. The evidence demonstrates that her mental health condition results in an inability to understand the importance of taking the medications as prescribed. She needs reminders and encouragement to take the medications and prevent further deterioration in her physical and mental health conditions.

In addition to the issue of the Petitioner's cognition and medication administration/management, the Petitioner raised issues with the assessment of Petitioner's ability to complete bathing, dressing and eating. The Petitioner's representative contends that the LTCFS has not accurately captured her needs, especially as they relate to her mental health conditions and how those conditions impact her ability to perform ADLs and IADLs. In particular, the Petitioner and her representative assert that the Petitioner does not regularly bathe, dress and eat due to depression and a resulting lack of motivation to complete those tasks on a regular basis. There is evidence to support the Petitioner's assertions. She also asserts that her hand condition (erythromelalgia) and chronic pain makes those particular ADLs difficult.

There is insufficient evidence in the record to determine what level of assistance the Petitioner requires for the ADL tasks. The assessors in 2013 and 2014 consistently report that Petitioner is able to complete all ADLs independently. The Petitioner's testimony suggests that there are times that she is unable to complete the tasks but it is not clear how frequently assistance might be required or the level of assistance that might be required. Based on the evidence, I conclude the agency properly assessed the Petitioner as independent with bathing, dressing and eating.

Based on all the evidence, I conclude the Petitioner meets the criteria for nursing home level of care based on Petitioner's cognitive impairment and need for assistance with four IADLs: meal preparation, medication administration/management, laundry/chores and transportation.

CONCLUSIONS OF LAW

The Petitioner meets the criteria for nursing home level of care.

THEREFORE, it is ORDERED

That this matter is remanded to the agency to take the administrative steps necessary to rescind the June 25, 2014 action reducing the Petitioner's level of care to non-nursing and to restore the Petitioner's level of care to a nursing home level of care based on the changes to cognition and medication administration/management noted in this decision. These actions shall be completed within 10 days of the date of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee, Wisconsin, this 6th day of October, 2014

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on October 6, 2014.

Milw Cty Dept Family Care - MCO
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